S.B. Civil Misc. Appeal No. 343/2001
(Girish Chandra and Anr. Vs. Smt. Sushma)

Date of order : 18.9.2006

HON'BLE MR. PRAKASH TATIA, J.

Mr. Manish Shishodia, for the appellants
Mr. S.N. Trivedi, for the respondent

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This appeal is against the order of the trial court dated 19.2.2001 by which the learned Additional District Judge, Deedwana, District Nagaur allowed the application filed by the respondent – mother of the boy Chandresh under Section 25 of the Guardians and Wards Act, 1890 read with Section 6 of Hindu Minority and Guardianship Act, 1956.

Brief facts of the case are that marriage of the appellant and respondent was solemnized on 4.12.1986. Out of their wedlock one son Chandresh born on 15.1.1989, one daughter also born and she is living with the respondent – mother. The relation between appellant and respondent became strained and it is alleged by the appellant that the respondent is living separately from the appellant since 1.2.1993 because of the dispute between the appellant and the respondent. A divorce petition was filed by the husband – appellant against the respondent-wife on 24.3.1998. The divorce was sought on the ground of desertion and cruelty. Ultimately, the divorce petition was decreed by the trial court on 18.8.2000 on the ground

of desertion by the wife but issue of cruelty was decided against the husband and in favour of the wife. Appeal against the divorce decree dated 18.8.2000, S.B. Civil Misc. Appeal No. 283/2001 (Sushma Vs. Girish Chandra) has been dismissed by this Court today on 18.9.2006.

The wife – respondent filed a petition under Section 25 of the Guardians and Wards Act, 1890 read with Section 6 of the Hindu Minority and Guardianship Act. In the said petition alongwith the husband, husband's father i.e. grand father of the child was also impleaded as party. It is alleged that the boy was living with his grand-father.

The issues were framed and the applicant gave her statement and produced witnesses AW-2 Shankar Lal and AW-3 Omprakash, who is father of the applicant-wife. Both the non-applicants appeared in the witness-box and produced witnesses NAW-3 Jayanti Lal, who was neighbour and NAW-4 Ashok Kumar, who was serving with the non-applicant and was friend of the non -applicant. Other witnesses produced by the non-applicant-husband are NAW-5 Gopal Soni and his son Chandresh @ Hunny.

The child Chandresh has shown his willingness to live with the father but the trial court held that looking to the welfare of the child, it will be appropriate that the child's custody be given to the mother-applicant, despite the fact that natural guardian of the child was non-applicant. The trial court also ordered that the child's

father will be entitled to meet with the child on Sundays and for that the applicant shall not put any obstruction.

Being aggrieved against the above order dated 19.2.2001 this appeal has been preferred by the father of the child and grand-father of the child is also impleaded as party in the appeal.

It is clear from the facts mentioned above, which is not in dispute, that the child born on 15.1.989 and by now he has completed more than 17 years. The child was called in the Court to know about his wishes then he appeared on 24.7.2006 and has shown his willingness to live with the appellant-father. The subsequent events rather say the passing of the time during litigation and continuation of the child with the appellant father has changed the situation materially. By passing of the time, the child has become age of full understanding and he has unequivocally shown his willingness to live with the father. The important fact which cannot be ignored is that since birth, since last more than 17 years the child is living with the father and it will be unjust to ask child who is age of more than 17 years to live with the mother with whom he did not live for so many years.

In view of the above for short period of few months only the custody of the child cannot be given to the mother of the child against the wishes of the child who is of the age of more than 17 years. Therefore, in view of

subsequent events which has materially effected the claim of the parties and disadvantages to the applicant, the order of the trial court dated 19.2.2001 deserves to be set-aside and the application filed by the applicant deserves to be dismissed. In the changed situation and continuous living of son with the father must have developed some more affinity between the father and son. Otherwise also, the father now can take care his grown up child more carefully, therefore, also the appeal deserves to be allowed.

Consequently, the appeal is allowed. The order of the trial court dated 19.2.2001 is set-aside. The application filed by the applicant – respondent under Section 25 of the Guardians and Wards Act, 1890 read with Section 6 of the Hindu Minority and Guardianship Act is hereby dismissed.

No order as to costs.

(PRAKASH TATIA), J.

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